

2 UNITED STATES BANKRUPTCY COURT

3 | SOUTHERN DISTRICT OF NEW YORK

4 Case No. 12-12020-mg

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**6 | In the Matter of:**

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8 | RESIDENTIAL CAPITAL, LLC, et al.,

9

## 10 | Debtors.

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 December 16, 2015

19 | 10:02 AM

20

## 21 | B E F O R E:

22 HON. MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

24

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1  
2 Doc# 9364, 9311 Status Conference on ResCap Borrower Claims  
3 Trust's Seventy-Fifth Omnibus Objection to Claims (No Liability  
4 Borrower Claims) Solely as it relates to the Claim Filed by  
5 Rhonda Gosselin.

6

7 (CC: Doc# 9355, 9359) Motion for Relief from Stay.

8

9 (CC: Doc# 9280, 9328, 9393) Hearing RE: ResCap Borrowers Claim  
10 Trust's Objection to Claim Nos. 4757, 4758, 4762, and 4764  
11 Filed By Patricia McNerney and Susan Gray.

12

13 (CC: Doc# 9334) Motion to Strike Affidavit of Sara Lathrop  
14 Filed in Support of Objections to Claims 4757, 4758, 4762, 4764  
15 Filed in Document 9280.

16

17 (CC: Doc# 9333) Motion to Strike Affidavit of David Wallace  
18 Filed in Support of Objection to Claims 4757, 4758, 4762, and  
19 4764 as Document Number 9280.

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1  
2 (CC: Doc# 9296) ResCap Borrower Claims Trust's Ninetieth  
3 Omnibus Objection to Claims ((I) No Liability Borrower Claims,  
4 (II) Reduce and Allow Borrower Claims, and (III) Allowed in  
5 Full Borrower Claim) Reset for 1/21/2016 at 10:00 a.m. as to  
6 Claim Filed by Mary R. Biancavilla. The hearing as to all  
7 other claims will be going forward.

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9 (CC: Doc# 9310) ResCap Borrower Claims Trust's Objection to  
10 Proof of Claim No. 5857.

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18  
19  
20 ALSO PRESENT:

21 RHONDA L. GOSSELIN, Party Pro Se (TELEPHONICALLY)  
22 SARA M. LATHROP, Senior Claims Analyst, ResCap Borrower  
23 Claims Trust (TELEPHONICALLY)

RESIDENTIAL CAPITAL, LLC, et al.

6

1 P R O C E E D I N G S

2 THE COURT: All right, please be seated.

3 We're here in Residential Capital, number 12-12020.

4 Mr. Wishnew.

5 MR. WISHNEW: Good morning, Your Honor. Jordan  
6 Wishnew, Morrison & Foerster, for the ResCap Borrower Claims  
7 Trust.

8 Your Honor, I'm happy to report, as your chambers has  
9 acknowledged, that the Connecticut HFA matter has been  
10 resolved. So with those -- that order entered, we are going to  
11 save ourselves a lot of paper going forward on future agendas,  
12 as well as the Court's time.

13 So that brings us to the first matter going forward  
14 this morning, the case management and the status conference for  
15 the ResCap Borrower Claims Trust seventy-fifth omnibus  
16 objection to claims as it pertains to the plaintiff Rhonda  
17 Gosselin. It's at the bottom of page 8 of today's agenda. I  
18 believe Ms. Gosselin is on the phone.

19 THE COURT: Ms. Gosselin, are you on the phone?

20 MS. GOSSELIN: Yes, this is Rhonda Gosselin.

21 THE COURT: Thank you.

22 MR. WISHNEW: Your Honor, this is a matter which I  
23 know the Court is familiar with. It is a claim that was  
24 res -- where there's a prior decision issued by the Court  
25 sustaining in part and overruling in part the Borrower Trust

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7

1 Claims objection to Ms. Gosselin's claim.

2 We had served discovery on Ms. Gosselin's counsel,  
3 Laird Heal, back --

4 THE COURT: Yes.

5 MR. WISHNEW: -- in the beginning of September.  
6 Subsequently, he was removed from the practice of law in  
7 Massachusetts and unable to represent Ms. Gosselin. For  
8 reasons I won't get into, we haven't been able to have a status  
9 conference until today. We have -- we, the Borrower Claims  
10 Trust, had made an initial settlement offer to Ms. Gosselin,  
11 which she respectfully declined. So at this point, we are  
12 looking for the Court's guidance as to how to move forward most  
13 efficiently to bring this matter to a resolution.

14 THE COURT: Okay. Ms. Gosselin, have you been able to  
15 obtain new counsel?

16 MS. GOSSELIN: Rhonda Gosselin. No, I haven't.

17 THE COURT: Are you going to proceed without counsel?

18 MS. GOSSELIN: Rhonda Gosselin. No.

19 THE COURT: I guess I don't understand your response.  
20 I mean, Mr. Heal, who was your counsel, had to withdraw, and  
21 that's occurred. So you're now -- unless you get new counsel,  
22 you're appearing on your own. That's okay. You're permitted  
23 to do that. It's unquestionably difficult for borrowers to  
24 proceed without counsel. Going back in time, the Trust had  
25 objected to your claim, and I had entered a written opinion and

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8

1 order sustaining in part and overruling in part the Trust Claim  
2 objection to your claim. So part of your claim survives.

3 The question is how we go forward. If you want to  
4 move forward and try and prevail on your claim, you're going to  
5 have to do it either on your own or with a new lawyer. At this  
6 stage, obviously, I'm not -- settlement is entirely voluntary.

7 It -- I don't force anybody to enter into settlements. And I  
8 know you've -- that's been pursued with the Trust, I assume,  
9 and it's been unsuccessful at this point.

10 So I need to enter a scheduling order to move forward.  
11 So I mean, it's your call, Ms. Gosselin, as to -- do you wish  
12 to proceed with your remaining claim against the Trust? Are  
13 you going to abandon the claim if you're going to proceed on  
14 your own, which you're entirely permitted to do. I'll enter a  
15 scheduling order, we'll move forward. I don't know whether  
16 there are any discovery issues that you want to raise, Ms.  
17 Gosselin, or Mr. Wishnew, that you want to raise.

18 MR. WISHNEW: Your Honor, we had previously served  
19 counsel with discovery in the form of request for admissions,  
20 some document requests, and those went -- we received no  
21 responses in a timely manner. So we would propose to reissue  
22 those, but would willing to move forward expeditiously with a  
23 truncated discovery --

24 THE COURT: Sure.

25 MR. WISHNEW: -- schedule.

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9

1 THE COURT: So Ms. Gosselin, tell me, what do you want  
2 to do?

3 MS. GOSSELIN: Rhonda Gosselin. I don't understand  
4 the -- everything fully. Laird Heal was my fifth attorney. I  
5 guess I'm unable to find an attorney to really represent  
6 me -- my case. I don't agree with a lot of it, so I don't know  
7 if it should go forward to a different court. This is what I  
8 don't understand. But I'll --

9 THE COURT: You -- Ms. Gosselin --

10 MS. GOSSELIN: -- I have no idea of --

11 THE COURT: -- Ms. Gosselin, it's going forward before  
12 me. I mean, that's -- you filed a proof of claim in the ResCap  
13 bankruptcy. The Trust objected to the claim. I overruled  
14 their objection in part and sustained it in part, so  
15 there -- do you have a copy of my written opinion?

16 MS. GOSSELIN: Rhonda Gosselin. Yes, I do. I have  
17 some information, but I don't know if I'm missing information.  
18 I don't know. I've been really sick, so Laird hasn't kept in  
19 touch with me that much --

20 THE COURT: Okay.

21 MS. GOSSELIN: -- on the details.

22 THE COURT: Sure. Well, what I'm -- let me ask this.  
23 And I'm -- I didn't realize that you had been through so many  
24 counsel before Mr. Heal. Mr. Heal appeared before me in some  
25 other ResCap matters as well so -- that were also affected by

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10

1 the fact that he had to withdraw. I just want to be clear on  
2 this. I think you've answered it clearly. But are you making  
3 any effort to find replacement counsel?

4 MS. GOSSELIN: I -- Rhonda Gosselin. I have been  
5 searching for counsel for -- since 2009 --

6 THE COURT: Okay.

7 MS. GOSSELIN: -- basically. And the only ones I  
8 found me that helped me the most was Laird Heal.

9 THE COURT: Yeah.

10 MS. GOSSELIN: At this moment, I don't have the money  
11 to hire the right attorney to take -- handle this matter.  
12 There's more going on than what you're seeing. It's really  
13 complicated -- to me, it's very complicated.

14 THE COURT: Sure.

15 Mr. Wishnew, what are the remaining factual or legal  
16 issues with respect to Ms. Gosselin's surviving claim?

17 MR. WISHNEW: Your Honor, one moment. The surviving  
18 claims deal with the issue of wrongful foreclosure, whether  
19 there's a claim under Chapter 93(a) of the Massachusetts  
20 General Laws, as well as a claim under another Massachusetts  
21 consumer debt statute.

22 THE COURT: All right. Mr. Wishnew, submit a proposed  
23 case management and scheduling order that includes ninety days  
24 for fact discovery, forty-five days for expert discovery, get a  
25 date from Deanna for the next case management and scheduling

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11

1 conference. It should occur shortly before -- find it -- if  
2 there are omnibus hearing dates, a few weeks before the close  
3 of the fact discovery period.

4 Ms. Gosselin, I -- at this stage, I have no choice but  
5 to move forward. I'm actually being maybe more generous than I  
6 otherwise would with the amount of time that I'm permitting.  
7 And it's certainly no fault of yours that Mr. Heal had to  
8 withdraw as counsel. I'm -- I just want to make clear -- and  
9 if you're able to find other counsel, the sooner the better.  
10 But the matter has to go forward. I can't continue to carry it  
11 longer without action. It's important that the remaining  
12 ResCap matters get resolved. Distributions to all borrowers  
13 with allowed claimed depends upon closing as many of the  
14 borrower matters as possible. And a lot of time has passed  
15 already.

16 As I say, I recognize it's through no fault of your  
17 own that Mr. Heal had to withdraw. But you'll get a  
18 copy -- I'll make sure -- Mr. Wishnew, make sure that Ms.  
19 Gosselin -- do you have your address, Mr. --

20 MR. WISHNEW: I do, Your Honor.

21 THE COURT: Okay. That she gets a copy of this  
22 proposed -- of the case management and scheduling order. I am  
23 going to enter it.

24 MR. WISHNEW: Okay.

25 THE COURT: And we'll move forward from there.

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12

1 Ms. Gosselin, I -- you'll -- if you're going to  
2 litigate, you can litigate on your own. You can find new  
3 counsel. It's important when I enter this order that counsel  
4 know those dates aren't going to be changed at this point. And  
5 after the discovery period, the case will be set for trial.  
6 You'll have to be here for the trial. It has to be done in  
7 person. I don't do those over the phone. I'm certainly --  
8 will permit you to appear at any case management conference by  
9 telephone, not having to come down here. And when I set a  
10 trial date -- if we set a trial date -- I try to do it  
11 as -- dates that are mutually convenient to both sides. So I  
12 won't sort of unilaterally do that without you having a say in  
13 it. But in terms of the discovery period, that's got to go  
14 forward now.

15 I encourage you, Ms. Gosselin, to continue to try to  
16 resolve the matter through settlement with the Trust. But  
17 that's completely -- I don't strong-arm anybody into  
18 settlement. You're entitled to your day in court. And when  
19 Mr. Heal was representing you, you were at least partially  
20 successful, because part of your claim survived. Issues under  
21 the Massachusetts statutes that remain in play -- 93(a) and a  
22 consumer protection statute -- are complicated issues. I don't  
23 dispute that, but that's what we're going to have to do.

24 So you'll get a copy of the order.

25 Mr. Wishnew, I encourage you to continue to try and

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13

1 talk to Ms. Gosselin and see whether you can resolve it.  
2 You'll keep me posted if -- not on the details of any  
3 settlement --

4 MR. WISHNEW: Of course.

5 THE COURT: -- obviously, but if you're able to  
6 resolve it. And I'll enter the case management scheduling  
7 order, and we'll move forward on that basis. And --

8 MR. WISHNEW: Thank you, Your Honor.

9 THE COURT: -- I'm just making clear, I'm not at this  
10 stage, given the amount of time that's passed, those dates are  
11 going to stick.

12 MR. WISHNEW: Understood, Your Honor.

13 THE COURT: Okay?

14 MR. WISHNEW: Yeah.

15 THE COURT: All right. Ms. Gosselin, thank you very  
16 much for participating by telephone today.

17 MS. GOSSELIN: Rhonda Gosselin. Thank you.

18 THE COURT: Okay.

19 MR. WISHNEW: Your Honor, the next matter on today's  
20 calendar is under page 10 under Section 4 of the agenda,  
21 Contested Matters. It's the petition of Patricia McNerney and  
22 Susan Gray, preliminary relief from the automatic stay. I  
23 believe Ms. Gray's in the courtroom.

24 THE COURT: Come on up, Ms. Gray.

25 MS. GRAY: Good morning, Your Honor. I'm Susan Gray.

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14

1 I'm representing Patricia J. McNerney with regard to two claims  
2 and also attorney fee claims that, under Ohio law, belong to  
3 the attorney. And therefore, I filed separate claims for those  
4 just to avoid any concern about the hypertechnicality of the  
5 claims process, that --

6 THE COURT: Okay.

7 MS. GRAY: -- those claims would have been lost. So  
8 I'm here on a motion for relief from stay and also on the Trust  
9 objection to our claims and on two --

10 THE COURT: Well, let me deal first with the motion  
11 for relief from stay. I've read all the papers. They're quite  
12 voluminous on everything. And the motion from relief from stay  
13 is denied. I've gone through -- in this circuit, we apply the  
14 Sonnax case from the Second Circuit with twelve factors. I've  
15 gone through, reviewed the pleadings, reviewed the history of  
16 the litigation in the Northern District of Ohio.

17 When your client and you filed a proof of claim in  
18 this court, the law is quite clear. You submit to the  
19 equitable jurisdiction of the bankruptcy court to resolve those  
20 claims as part of the claims allowances process. It's only in  
21 fairly rare circumstances that I will lift the stay to permit  
22 litigation to be resolved elsewhere, even to fix the amount of  
23 the claims, which is what you're asking to be able to do.

24 One of the things that neither party had called to my  
25 attention is that Judge Lesley Wells, the district judge in the

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15

1 Northern District of Ohio, before whom the matter has been  
2 pending, retired from the bench in early October 2015.

3 MS. GRAY: News to me, Your Honor.

4 THE COURT: Okay. So the history of this case, as  
5 I've looked carefully, there was the prior litigation first in  
6 state court.

7 MS. GRAY: Correct.

8 THE COURT: And I guess it was a trial, but no  
9 decision.

10 MS. GRAY: Exact, Your Honor.

11 THE COURT: And then, that was the first foreclosure  
12 action, and you had counterclaims -- your client -- you filed  
13 counterclaims on that on behalf of your client. That was  
14 ultimately dismissed. The second foreclosure action was filed  
15 in federal court in the Northern District of Ohio. It was  
16 before Judge Wells. You filed counterclaims again. You added  
17 some additional counterclaims. The debtor, before bankruptcy,  
18 filed a motion for judgment on the pleadings and a motion for  
19 summary judgment.

20 While those matters were briefed, before there was any  
21 decision, the debtors filed their Chapter 11 case here. The  
22 case in the Northern District of Ohio was stayed as a result of  
23 the bankruptcy. I guess Judge Wells was a senior judge when  
24 the matter before him (sic) was pending.

25 MS. GRAY: Her, Your Honor.

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16

1 THE COURT: And he'd been a senior judge for about  
2 seven or eight years, but he retired -- Judge Wells retired  
3 from the bench, I think it was either October 2nd or 5th, 2015.  
4 So there is nobody in that court with familiarity about any of  
5 these proceedings.

6 Your motion papers that you filed here, your response  
7 to the objection essentially duplicates the pleadings in what  
8 were the pending motions before Judge Wells at the time that  
9 the bankruptcy interceded. So I've considered each of the  
10 twelve Sonnax factors and concluded that they weigh heavily in  
11 favor of the McNerney and Gray claims being adjudicated here as  
12 part of the claims allowance process. One of the things you  
13 argue is, mistakenly, that Ms. McNerney would be entitled to a  
14 jury trial. And that's not correct.

15 MS. GRAY: I agree, Your Honor.

16 THE COURT: Okay, that when you file a proof of claim  
17 you submit to the equitable jurisdiction --

18 MS. GRAY: Right.

19 THE COURT: -- and there is no jury.

20 So I'll simply enter an order, and ask Mr. Wishnew to  
21 prepare it, that for the reasons stated the motion to lift the  
22 stay is denied. But I do want to go on and hear argument with  
23 respect to the Trust objection to the claims.

24 On that score, we'll let Mr. Wishnew argue first, and  
25 then you'll have a chance to respond, okay?

RESIDENTIAL CAPITAL, LLC, et al.

17

1 MS. GRAY: Thank you, Your Honor. May I ask one  
2 question, though --

3 THE COURT: Sure, go ahead.

4 MS. GRAY: -- with regards to the lift from the stay?  
5 In the -- with regard to the underlying issues, there is one  
6 witness who is a hostile witness, who is located in Ohio. And  
7 I guess if we go to trial, we'll have to do it by video or  
8 something.

9 THE COURT: No, we don't do any -- I don't -- there's  
10 one of two things. You're assuming you're going to get to  
11 trial. We'll see whether you get to trial. The -- you can  
12 take the witness' deposition. You can take it as a video  
13 deposition. And when I have a trial, it's not uncommon to have  
14 witness testimony presented by deposition, designations,  
15 counterdesignations, et cetera, including video depositions.  
16 And so that's -- I can't -- if the witness is outside the  
17 subpoena power of the Court, the witness can't be forced to  
18 attend in court. But that doesn't prevent you from taking the  
19 deposition and taking a video deposition, if that's what you  
20 choose to do. So --

21 MS. GRAY: We'll work it out, Your Honor.

22 THE COURT: I mean, that's not uncommon.

23 MS. GRAY: Okay.

24 THE COURT: Okay?

25 MS. GRAY: Thank you.

RESIDENTIAL CAPITAL, LLC, et al.

18

1 THE COURT: All right, thanks very much.

2 Mr. Wishnew?

3 MR. WISHNEW: Thanks, Your Honor.

4 THE COURT: Let me just make a note, okay?

5 Okay.

6 MR. WISHNEW: Thank you, Your Honor. Jordan Wishnew,  
7 Morrison & Foerster for the ResCap Borrower Claims Trust.

8 The next matter on today's agenda is under Section 5  
9 of the agenda on page 10, item 6, which is the ResCap Borrower  
10 Claims Trust objection to claim numbers 4757, 4758, 4762, and  
11 4764, filed by Patricia McNerney and Susan Gray, docket number  
12 9280. The Borrower Trust -- sorry, Ms. McNerney or the  
13 claimants filed a response to the objection at docket number  
14 9328. The Borrower Trust filed a reply in support of the  
15 objection at docket number 9393. The Borrower Trust's reply  
16 also addressed to motions to strike that were filed by the  
17 claimants, which were filed at docket numbers 9333 and 9334.

18 Your Honor, through the objection, after thoroughly  
19 examining the debtors' books and records, the Borrower Trust  
20 seeks to expunge the claimants' proofs of claim because they do  
21 not sufficiently allege how the debtors' actions gave rise to  
22 liability for the stated causes of action. In support of the  
23 objection and the reply, the Borrower Trust submitted a  
24 declaration of Sara Lathrup, senior claims analyst to the  
25 Borrower Trust, as well as the declaration of David Wallace,

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19

1 co-counsel to the ResCap Liquidating Trust. Both Mr. Wallace  
2 and Ms. Lathrup are on the phone today and available to answer  
3 any questions the Court may have.

4 The claimant asserts eleven causes of action related  
5 to alleged wrongdoing that occurred during the brokering and  
6 origination of Ms. McNerney's loan in December 2002. I  
7 recognize the Court has thoroughly read all the submissions, so  
8 I will not repeat our arguments as to why each cause of action  
9 is devoid of merit. However, I do want to address one point  
10 that relates to a majority of the causes of action. Seven of  
11 eleven causes of action are premised on the wrongdoing of Ms.  
12 McNerney's mortgage broker, OMC Lending, not the actions of  
13 Homecomings.

14 The claimants assert that Homecomings' alleged  
15 liability for these seven causes of action derive from the  
16 claimants' mistaken legal theory that Homecomings is  
17 responsible for the actions of OMC because OMC was purportedly  
18 acting as Homecomings' agent. However, this argument fails, as  
19 a matter of law, as there is no evidence of either an expressed  
20 or implied agency relationship between OMC and Homecomings with  
21 regard to the origination of loans.

22 And just for completeness, Your Honor, the seven  
23 causes of action, based upon the allegations made in the  
24 claimants' pleadings, tie to the agency principal arguments are  
25 breach of fiduciary duty, negligence, improvident lending, the

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20

1 Ohio Consumer Sales Practice Act, the Ohio Mortgage Broker  
2 Act --

3 THE COURT: Just a second. I want to make some notes.

4 MR. WISHNEW: I'm sorry. I'll start over.

5 THE COURT: No, I'm with you so far.

6 MR. WISHNEW: Okay. Ohio Mortgage Broker Act, fraud,  
7 intentional misrepresentation, and negligent misrepresentation.

8 THE COURT: Okay.

9 MR. WISHNEW: The --

10 THE COURT: So that's where I -- I mean, I -- yes, it  
11 appears to me that each of those causes of action depends on  
12 whether OMC was Homecomings' agent, either on actual authority,  
13 apparent authority, agent by estoppel. So one of the things  
14 that I've tried to focus on and ask both counsel to address is  
15 what does the -- and again, there hasn't been an evidentiary  
16 hearing. But because claim objections involving a shift --  
17 involve a shifting burden, and while a properly prepared proof  
18 of claim is prima facie evidence of validity and amount, if the  
19 objecting party, here, the Trust comes forward with evidence  
20 that refutes at least one essential element of the claim, the  
21 burden shifts to the claimant to come forward with evidence of  
22 equal or greater force.

23 You've put forward in your papers, Mr. Wishnew, a  
24 written agreement between Homecomings and OMC which disclaims  
25 an agency relationship.

RESIDENTIAL CAPITAL, LLC, et al.

21

1 MR. WISHNEW: Correct, for a very limited purpose,  
2 Your Honor.

3 THE COURT: Well, it's an -- OMC was an agent for --

4 MR. WISHNEW: I'm sorry, yes.

5 THE COURT: -- for what --

6 MR. WISHNEW: Yes.

7 THE COURT: -- for a limited purpose.

8 MR. WISHNEW: Correct, correct.

9 THE COURT: And that limited purpose was what?

10 MR. WISHNEW: Only for the notice. So referring Your  
11 Honor to Exhibit G -- let me just make sure I'm referring to  
12 the right declaration. So it's Exhibit G to the Lathrop  
13 declaration at docket number 9280-2.

14 THE COURT: Just let -- let me turn, okay?

15 Okay.

16 MR. WISHNEW: Paragraph 1, titled Relationship of  
17 Parties on --

18 THE COURT: Wait. I'm in the wrong Exhibit G. Give  
19 me a second, okay? It's a big binder.

20 MR. WISHNEW: I understand, Your Honor.

21 THE COURT: Okay, I'm with you.

22 MR. WISHNEW: Okay. Paragraph 1, titled Relationship  
23 of Parties, "Broker-Lender", which is Ohio Mortgage Company,  
24 Inc. -- "Broker-Lender shall conduct all business with  
25 Homecomings as a nonexclusive independent contractor, and not

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22

1 as an agent, partner or affiliate of Homecomings, and shall not  
2 use Homecomings' name in any advertising without Homecomings'  
3 express written consent.

4 "This broker-lender agreement is broker-lender's  
5 authorization to act as Homecomings' agent for the purpose of  
6 delivering notices of action taken as required by the Equal  
7 Credit Opportunity Act and its Regulation B."

8 THE COURT: Okay.

9 MR. WISHNEW: So Your Honor, very clearly, Homecomings  
10 did not have an exclusive arrangement with OMC. OMC could have  
11 brokered to any number of potential lenders. OMC was Ms.  
12 McNerney's agent, not Homecomings.

13 THE COURT: Yes, so I read a portion of the state  
14 court trial transcript. It's attached to the declaration. And  
15 the portion of the transcript I read was the cross-examination  
16 of Ms. McNerney. And she, in that testimony, acknowledged that  
17 she reached out to OMC in her effort to find a replacement  
18 loan. She had to refinance because of a divorce, as I  
19 remember.

20 MR. WISHNEW: Right. So the fact of the matter is,  
21 Your Honor, Ms. McNerney went to OMC. It's obvious from the  
22 arguments that she was very displeased with how OMC performed,  
23 but there's no connection --

24 THE COURT: Well, she's --

25 MR. WISHNEW: -- there's --

RESIDENTIAL CAPITAL, LLC, et al.

23

1 THE COURT: -- unhappy now. If she was then, I don't  
2 know.

3 MR. WISHNEW: Right. And the fact is there's no  
4 connection or there's no facts to suggest that somehow  
5 Homecomings ever held itself out as OMC's principal. So the  
6 facts just don't exist. And so to the extent claimant is  
7 trying to tie liability for these seven causes of action under  
8 the principal agency theory, it fails, Your Honor.

9 THE COURT: Well, I didn't see -- and Ms. Gray will  
10 point out to me if there is any -- I didn't see anything in  
11 that state court trial transcript of Ms. McNerney's examination  
12 where she said that either OMC said it was acting on behalf of  
13 Homecomings or where she testified in any other way -- she  
14 said -- I think she said she had no contact with Homecomings.

15 MR. WISHNEW: That's correct, absolutely.

16 THE COURT: So what is it in the record that could  
17 refute the contractual language where the only thing that OMC  
18 was an agent for Homecomings was for delivery of notices?

19 MR. WISHNEW: I don't believe --

20 THE COURT: I guess the focus of the claims, as I  
21 understand it is, is that OMC may have used Homecomings'  
22 application software to fill in information that was submitted  
23 with the loan application.

24 MR. WISHNEW: That's right, but that's after the fact.  
25 And really, the nucleus of operative facts we're dealing with

RESIDENTIAL CAPITAL, LLC, et al.

24

1 here in which claimant is trying to tie liability to  
2 Homecomings is everything that took place during the  
3 application process, when Ms. McNerney was dealing with  
4 Homecoming -- sorry, when Ms. McNerney was dealing with OMC,  
5 she was not dealing with -- as Your Honor pointed out, she was  
6 not dealing with Homecomings; she was dealing with OMC. And so  
7 there's nothing in the record to our -- in our position, that  
8 suggests that she knew of the Homecomings-OMC relationship,  
9 that it was in any way exclusive.

10                   In fact, the argument -- the agreement says just  
11 the contrary.

12                   THE COURT: Well, that could be -- I mean, it doesn't  
13 have to be exclusive for OM -- for OMC to have been  
14 Homecomings' agent in connection with this loan wouldn't  
15 require that OMC be the exclusive -- have an exclusive  
16 relationship with --

17                   MR. WISHNEW: Right.

18                   THE COURT: -- with Homecomings.

19                   MR. WISHNEW: But I mean, clearly, Ms. McNerney had  
20 absolutely no knowledge of a relationship. And so it was her  
21 seeking out the assistance of OMC, her dealing with OMC, and  
22 then, subsequently, OMC reaching out to Homecomings to see if  
23 they would accept the loan. That's the extent of the  
24 connection between the three parties.

25                   There's not a sufficient connection between OM -- I'm

1 sorry, between Ms. McNerney and Homecomings to warrant any sort  
2 of finding that OMC was Homecomings' agent.

3 Your Honor, I'm not sure -- I mean, I can go through  
4 the different causes of action and highlight our principal  
5 arguments, unless you just want to ask questions you might have  
6 as to the --

7 THE COURT: Well, I -- Ms. Gray cites in her brief the  
8 Sixth Circuit's decision in *Brainard v. American Skandia Life*  
9 Assurance Corp., 432 F.3d 655 (6th Cir. 2005). And the Court  
10 there, at pages 661 through 663, dealing exclusively with Ohio  
11 law, which is the applicable set of legal principles that I  
12 need to apply here -- and this really -- and the court in  
13 *Brainard* relies on Ohio State Court decisions and also, I  
14 think, some federal court decisions as well. And the court  
15 goes through and talks about an agency relationship may arise  
16 pursuant to several theories.

17 First, actual agency occurs where a consensual  
18 relationship exists between the agent and the principal.  
19 Agency relationships may also arise from apparent agency or  
20 agency by estoppel. And I won't go through it, but the court  
21 goes through analyzes each of those and sets out what has to be  
22 shown. The agency by estoppel, the court deals with in  
23 footnote 4. And while Ms. Gray -- to argue on it, I mean, that  
24 seems clearly inapplicable here, the agency by estoppel theory.

25 But I do want you, Mr. Wishnew, to talk about apparent

RESIDENTIAL CAPITAL, LLC, et al.

26

1 agency, because what does -- what is it that Ms. Mc너ney would  
2 have to establish --

3 MR. WISHNEW: Sure.

4 THE COURT: -- to show apparent agency?

5 MR. WISHNEW: Sure. And the court -- the Brainard  
6 court addresses that, Your Honor, on 662 and 663. This is at  
7 headnotes 8 and 9, where it says, "For similar reasons, no  
8 parent authority agency" -- I'm sorry, let me skip ahead.

9 THE COURT: Don't read headnotes.

10 MR. WISHNEW: Yeah.

11 THE COURT: Read the opinion.

12 MR. WISHNEW: "For an agent to bind the principal in  
13 the context of apparent authority, the presented evidence must  
14 reflect '(1) that the principal held the agent out to the  
15 public as possessing sufficient authority to embrace the  
16 particular act in question, or knowingly permitted him to act  
17 as having such authority, and (2) that the person dealing with  
18 the agent knew of the facts and ... in good faith had reason to  
19 believe and did believe that the agent possessed the necessary  
20 authority.'" And I'll omit the citations, Your Honor.

21 Your Honor, with regards to these two elements, it's  
22 our position that -- the Trust's position that the facts in the  
23 record support neither element. The fact of the matter is that  
24 we've not seen any evidence that Homecomings held OMC out to  
25 the public as possessing sufficient authority to embrace the

RESIDENTIAL CAPITAL, LLC, et al.

27

1 particular act in question or even knowingly permitted OMC to  
2 act as having such authority; and two, that Ms. McNerney, who  
3 dealt with OMC, clearly has said she did not know of the OMC-  
4 Homecomings relationship. So I think it's fairly evident from  
5 the fact --

6 THE COURT: This is a little different than I often  
7 have, because here, there was the state court trial. It didn't  
8 result in a decision, but there's a transcript, which is --  
9 which I do have in front of me, which I have read.

10 MR. WISHNEW: Right, Your Honor. And so I think the  
11 facts that are gleaned from that transcript suggest that Ms.  
12 McNerney lack of knowledge clearly argues against a finding of  
13 apparent authority.

14 THE COURT: Okay. So is there anything else you want  
15 to say? I understand that in your brief you talk a little bit  
16 more than just the agency theory. But as to those causes of  
17 action that are linked to finding that -- would require a  
18 finding that OMC was Homecomings' agent.

19 MR. WISHNEW: Um-hum.

20 THE COURT: Are there any other arguments you want to  
21 make with respect to that, other than the agency argument?

22 MR. WISHNEW: I mean, Your Honor, I'm happy to reply  
23 upon the arguments --

24 THE COURT: Okay.

25 MR. WISHNEW: -- in both our objection and reply.

RESIDENTIAL CAPITAL, LLC, et al.

28

1 THE COURT: All right. So what about the other causes  
2 of action?

3 MR. WISHNEW: So Your Honor, with regards to the other  
4 causes of action, you have Ms. -- with regards to the causes of  
5 action for TILA and RESPA, it's our position that those causes  
6 of action are barred by the applicable statutes of limitation.  
7 Ms. McNerney's cause of action for unconscionability fails  
8 because she's not demonstrated the loan was either procedurally  
9 or substantively unconscionable.

10 With regards to the claim for fraud in the court,  
11 courts in Ohio have opined that this does not give rise to a  
12 private cause of action.

13 For the cause of action for breach of privacy, the  
14 allegations with regards to this claim demonstrate neither the  
15 disclosure of private information nor a wrongful intrusion on  
16 her seclusion.

17 Finally, the claim for civil conspiracy fails because  
18 there's not been any evidence of an actual agreement between  
19 OMC and Homecomings to commit a wrongful act.

20 So for the reasons discussed throughout the objection  
21 and reply and the supporting declarations, we'd ask that the  
22 objection be granted and the four claims at issue be stricken  
23 entirely from the debtors' claims registry.

24 THE COURT: All right.

25 Ms. Gray.

RESIDENTIAL CAPITAL, LLC, et al.

29

1 MS. GRAY: Thank you, Your Honor. Starting first with  
2 the agency theory, the evidence in this case is not fully  
3 before the Court. I was not actually anticipating a full  
4 evidentiary hearing today, but I --

5 THE COURT: Well, it's not -- this is not an  
6 evidentiary hearing.

7 MS. GRAY: Okay. And --

8 THE COURT: I want to make that clear.

9 MS. GRAY: Okay.

10 THE COURT: But what the standard on claim  
11 objections -- I can't count the number of opinions I've issued  
12 in ResCap where I lay out, basically, the so-called shifting  
13 burden with respect to claim objections. So a properly  
14 prepared proof of claim may be entitled to prima -- it's prima  
15 facie as to validity and amount. The objector then must rebut  
16 at least one essential element of the claim here of each of the  
17 causes of action. And if they do so, then the burden shifts to  
18 the claimant to come forward with evidence of equal or greater  
19 weight.

20 MS. GRAY: That is --

21 THE COURT: So with respect to -- at least with  
22 respect to the actual agency argument, here, properly, in my  
23 view, the Trust has come forward with the written agreement  
24 between OMC and Homecomings, which disclaims an agency  
25 relationship sufficient to encompass the claims that have been

RESIDENTIAL CAPITAL, LLC, et al.

30

1 asserted here by your client.

2 For better or worse, I have the trial transcript from  
3 the state court first foreclosure action, when your client was  
4 examined. And she very forthrightly said she didn't have any  
5 contact with Homecomings. She didn't -- there's nothing to  
6 indicate that OMC said that they were acting for Homecomings.  
7 She went to them as a mortgage broker. They inputted her  
8 information. I know you say that they -- that the information  
9 they input was inaccurate, purposely or otherwise. I can't  
10 speak to that. Your client got the loan.

11 What's the evidence -- how have you rebutted the  
12 Trust's showing that OMC was not Homecomings' agent in  
13 connection with arranging for a loan for Ms. McNerney?

14 MS. GRAY: Several things. One is the trial testimony  
15 also showed -- and this is the section having to do with  
16 whether Homecomings gave a kickback, which would be a violation  
17 of RESPA. Homecomings paid OMC Lending a lot of money to make  
18 this loan. And in support of the allegation that it was not a  
19 kickback, Homecomings brought out testimony that OMC Lending  
20 did all this work for Homecomings and on behalf of Homecomings,  
21 thereby --

22 THE COURT: They did a lot of work to complete an  
23 application that was submitted to Homecomings --

24 MS. GRAY: On behalf of Homecomings, thereby  
25 justifying --

RESIDENTIAL CAPITAL, LLC, et al.

31

1 THE COURT: Show me that --

2 MS. GRAY: -- the fee.

3 THE COURT: -- show me that testimony, okay? Because  
4 that's -- my recollection is not the way you've just described  
5 it.

6 MS. GRAY: That --

7 THE COURT: Just stop for a second. Paying OMC -- OMC  
8 wasn't doing this gratis. There's no question about it. But  
9 paying them a fee in connection with the loan that Homecomings  
10 made to your client is not inconsistent with an independent  
11 contractor relationship between a mortgage broker and a lender.

12 Is it? Do you have any case --

13 MS. GRAY: Yes.

14 THE COURT: -- that supports the notion that paying  
15 a -- you call it a kickback; I don't call it a kickback, but  
16 that's besides the point for now -- is there -- do you have any  
17 case that would say that by paying OMC a fee in connection with  
18 the loan that Homecomings made to McNerney that that makes OMC  
19 Homecomings' agent?

20 MS. GRAY: The RESPA regulations -- I read that --

21 THE COURT: Don't talk to me about RESPA. You have --  
22 we'll talk about RESPA separately, because you've got statute  
23 of limitations problems with respect to RESPA, okay? Let's  
24 deal with your fiduciary duty, Consumer Fraud Act, all of  
25 negligence, fraud. Do you have any case authority that would

RESIDENTIAL CAPITAL, LLC, et al.

32

1 support that the payment of a fee by Homecomings to OMC makes  
2 OMC Homecomings' agent?

3 MS. GRAY: I think the payment of the fee --

4 THE COURT: Maybe you didn't hear what I said.

5 MS. GRAY: Well, Your Honor, maybe --

6 THE COURT: Let me ask it one more time. Do you have  
7 any case authority -- I don't want to -- I'll let you argue,  
8 but when I ask you a question specifically whether you have any  
9 case authority that supports the argument you're making, I  
10 expect an answer to that.

11 MS. GRAY: Your Honor --

12 THE COURT: And then I'll let you go on and argue.

13 Tell me, do you have a case that supports your argument?

14 MS. GRAY: Other than what is in my brief, Your Honor,  
15 no.

16 THE COURT: Well, what case in your brief supports  
17 your argument? Most of your brief was taken up with arguing  
18 about whether I should lift the stay. You did address the  
19 merits as well, but most of the brief was taken up with whether  
20 the stay should be lifted, which I've already ruled on.

21 Point to me to a case or cases in your brief that you  
22 believe establishes -- supports the position that OMC was  
23 Homecomings' agent by virtue of Homecomings paying a fee.

24 MR. WISHNEW: I think that's part -- the Brainard -- I  
25 guess I'm just relying on the Brainard case. That's part of

RESIDENTIAL CAPITAL, LLC, et al.

33

1 the constellation of events. And the important part of that  
2 constellation has to do with the fact that, in completing the  
3 desktop underwriter data and sending it to Homecomings for  
4 approval, along with all of the underlying backup factual  
5 information, Homecomings ratified the act of --

6 THE COURT: Your argument -- you're straying into  
7 outer space on this now.

8 MS. GRAY: OMC --

9 THE COURT: I mean, the Brainard case, at page 661, on  
10 the actual authority discussion, "Simply stated, 'express  
11 authority is that authority which is directly granted to or  
12 conferred upon the agent or employee in express terms by the  
13 principal, and it extends only to such powers as the principal  
14 gives the agent in direct terms[.]" citing the Davis case, an  
15 Ohio case. So I don't read Brainard supporting your argument  
16 at all with respect to the actual authority point.

17 What language in Brainard are you pointing to? You're  
18 talking about a constellation of facts. Brainard's very clear,  
19 and it rejects the actual authority argument because there was  
20 nothing -- there was no agreement between the parties creating  
21 actual authority. That seems to me pretty closely on point to  
22 this case.

23 Here, there is a writing, and it disclaims an agency  
24 relationship except with respect to giving a notice. And  
25 Brainard shows you can be an agent for some purposes and not

RESIDENTIAL CAPITAL, LLC, et al.

34

1 for others. You need to be able to make OMC Homecomings' agent  
2 for purposes of making the loan, not just notices.

3 Go ahead. Do you have any other case, or Brainard's  
4 the only case you're relying on?

5 MS. GRAY: I think that even if -- and of course, this  
6 agency contract was never shown to Ms. McNerney or the  
7 limitation was never shown --

8 THE COURT: But she didn't even know about  
9 Homecomings.

10 MS. GRAY: -- to Ms. McNerney. However, even if they  
11 were just the agent for giving notices, they didn't give proper  
12 notices. They did not give a proper notice of right to cancel.  
13 They did not give a proper Truth in Lending disclosure  
14 statement. They did not --

15 THE COURT: Well, the problem you have with the TILA  
16 and RESPA claims -- and I'll address that separately -- is the  
17 statute of limitations.

18 MS. GRAY: Your Honor I will happily address that.

19 THE COURT: These facts are old, and the Trust makes  
20 the argument that those claims -- having nothing to do with  
21 agency -- but those claims are barred by the applicable  
22 statutes of limitations.

23 But let's just -- let's finish talking about --

24 MS. GRAY: Okay.

25 THE COURT: And I do want you to address those

RESIDENTIAL CAPITAL, LLC, et al.

35

1 arguments.

2 MS. GRAY: Okay. A fair -- but --

3 THE COURT: But let's just finish up on --

4 MS. GRAY: Okay.

5 THE COURT: Let me ask you this: do you have anything  
6 else that you believe points to actual -- an actual authority-  
7 agency relationship between OMC and Homecomings?

8 MS. GRAY: Yes, I would just like to finish that if  
9 they were, in fact, the agent for giving notices, they  
10 negligently gave notices. They negligently gave -- every  
11 notice that they gave was backdated, was inaccurate, and failed  
12 to fulfill their duty to accurately give notices. They gave  
13 wrong notices. And the fact of giving wrong --

14 THE COURT: Which causes of action deal with wrong  
15 notices?

16 MS. GRAY: All of the --

17 THE COURT: Do they really?

18 MS. GRAY: All of the agency --

19 THE COURT: Oh, come on.

20 MS. GRAY: All of the agency causes of action deal  
21 with the negligent and intentional misrepresentation in the  
22 delivery of those notices and delivery of information about the  
23 loan, including the false information in the desktop  
24 underwriter, which would have disqualified --

25 THE COURT: That's not notice.

RESIDENTIAL CAPITAL, LLC, et al.

36

1 MS. GRAY: -- her for the loan.

2 THE COURT: That's not a notice. What's a notice that  
3 was sent to your client that you believe was false or  
4 fraudulent?

5 MS. GRAY: Truth in Lending disclosure statement, the  
6 notice --

7 THE COURT: Okay.

8 MS. GRAY: -- of right to cancel.

9 THE COURT: And your TILA claims, they argue, are time  
10 barred. And I'm going to let you argue -- I want to try and  
11 keep these things -- these arguments separately, okay? I'm  
12 dealing first with the causes of action that clearly do hinge  
13 on OMC being determined to be Homecomings' agent. That's not  
14 the case for TILA and RESPA.

15 MS. GRAY: While that is true, Your Honor. Those are  
16 the notices that they were required to deliver in fulfillment  
17 of their agency, and therefore part of their agency --

18 THE COURT: Okay. If you got a TILA claim or a RESPA  
19 claim, I'm going to ask you to address whether -- whether the  
20 notices they gave were correct or not correct, TILA and RESPA  
21 have statutes of limitations. The Trust has argued that the  
22 statute of limitations bars those claims. Stick with the other  
23 causes of action. We'll come to the TILA and RESPA claims.

24 MS. GRAY: Your Honor, in mortgage loan origination  
25 case, the most important notices are the notices of right to

RESIDENTIAL CAPITAL, LLC, et al.

37

1 cancel, and those are the notices that were the express  
2 obligation of the agent to deliver.

3 THE COURT: Required under --

4 MS. GRAY: So they are --

5 THE COURT: -- required under what law?

6 MS. GRAY: Required under the law of Truth in  
7 Lending -- required in any mortgage loan -- RESPA --

8 THE COURT: Okay. So all you want to talk about is  
9 TILA and RESPA. We'll come to that. I'm going to listen to  
10 you in TILA and RESPA. But right now, Ms. Gray -- I don't know  
11 how many times I have to ask the same question to get an answer  
12 from you. You want to --

13 MS. GRAY: I believe --

14 THE COURT: -- talk about TILA and RESPA. I'll get to  
15 TILA and RESPA. What I want you to address now are the other  
16 causes of action. TILA and RESPA do not depend -- the  
17 objection to the TILA and RESPA claim does not depend on  
18 whether OMC was Homecomings' agent or not.

19 MS. GRAY: That is true.

20 THE COURT: So would you address the ones that do  
21 depend on the agency relationship?

22 MS. GRAY: The negligence, the breach of fiduciary  
23 duty, and failure to give proper --

24 THE COURT: Okay.

25 MS. GRAY: -- notices, including notices regarding

RESIDENTIAL CAPITAL, LLC, et al.

38

1 what the loan was about, what the terms would be, all -- not  
2 just the Truth in Lending disclosure statement, not just the  
3 notice of right to cancel, but all notice regarding what the  
4 terms of the loan would be, when the closing would be, what the  
5 first payment would be, all that information that the broker  
6 was required to give and did not give.

7 THE COURT: Okay. This says that "This broker-lender  
8 agreement is broker-lender's authorization to act as  
9 Homecomings' agent for the purposes of delivering notices and  
10 action taken as required by the Equal Credit Opportunity Act  
11 and its Regulation B." Okay? Tell me what notices -- I didn't  
12 see anything in your claim stating that the notices required by  
13 the Equal Credit Opportunity Act and its Regulation B were not  
14 delivered.

15 MS. GRAY: The agency was not limited just to that  
16 notice, Your Honor.

17 THE COURT: What does it say? You're saying that --

18 MS. GRAY: But I'm also saying what happened. I'm  
19 also saying the facts, the facts that they gave a HUD-1  
20 statement showing Homecomings as the lender, that they showed  
21 that -- that Homecomings approved the HUD-1 statement --

22 THE COURT: All right.

23 MS. GRAY: -- and, in fact, created --

24 THE COURT: I'm giving you one last chance. Is there  
25 anything else you want to tell me about the agency theory that

RESIDENTIAL CAPITAL, LLC, et al.

39

1 supports anything other than the notices that you want to  
2 complain about? Last chance.

3 MS. GRAY: No, I think I'm done.

4 THE COURT: All right. Now, let's go on. You want to  
5 talk about the notices, let's talk about this -- I want to hear  
6 from you about the statute of limitations for TILA and RESPA  
7 claims.

8 MS. GRAY: All right. The important -- there are  
9 several important statutes of limitations. One is the one-year  
10 statute of limitation for failure to properly disclose. The  
11 other is the three-year statute of limitations for the right to  
12 rescind. Ms. McNerney rescinded well within the three-year  
13 period.

14 THE COURT: When did she seek to rescind?

15 MS. GRAY: She rescinded when she filed her  
16 counterclaim in the county court, and I do refer Your Honor to  
17 Jesinoski v. Countrywide, which is a United States Supreme  
18 Court unanimous decision, 1/13/15, that says, "A borrower need  
19 only give notice in writing. They do not" -- "she need not  
20 file suit within three years" --

21 THE COURT: Give me the cite again.

22 MS. GRAY: It's J-E-S-I-N-O-S-K-Y (sic) v.  
23 Countrywide. It's a 2015 case. It's a slip opinion issued  
24 1/13/15, and a unanimous Supreme Court.

25 THE COURT: All right. All right.

RESIDENTIAL CAPITAL, LLC, et al.

40

1 MS. GRAY: So --

2 THE COURT: So tell me --

3 MS. GRAY: -- she rescinded well within --

4 THE COURT: Stop.

5 MS. GRAY: -- that three-year period.

6 THE COURT: Stop, stop. I want the dates. When --  
7 the loan closed on what date?

8 MS. GRAY: January 3, 2003.

9 THE COURT: And when did she seek to rescind, in your  
10 view?

11 MS. GRAY: She rescinded.

12 THE COURT: When?

13 MS. GRAY: On -- the case was filed on 11/10/2003.

14 She answered within twenty-eight days of that period, and that  
15 is when she rescinded.

16 THE COURT: And the Countrywide decision deals with  
17 rescission under which statute?

18 MS. GRAY: 15 U.S.C. 1635(b), the Truth in Lending  
19 Act.

20 THE COURT: Okay. What is the statute -- what's the  
21 applicable statute of limitations for RESPA?

22 MR. WISHNEW: One year -- one year.

23 THE COURT: And do you agree that the statute of  
24 limitations have run on the RESPA claim?

25 MS. GRAY: No, because it relates to the date of the

RESIDENTIAL CAPITAL, LLC, et al.

41

1 complaint. It did not --

2 THE COURT: It does not -- was it in the -- did you  
3 assert a RESPA claim?

4 MS. GRAY: In the counterclaim? Yes. Yes.

5 THE COURT: In the counterclaim? When was the  
6 counterclaim filed?

7 MS. GRAY: The counterclaim was filed twenty-eight  
8 days after 11/10/2003.

9 THE COURT: And what was the RESPA violation?

10 MS. GRAY: We asserted a kickback.

11 THE COURT: And what was the TILA violation?

12 MS. GRAY: The TILA violation was that they failed to  
13 deliver clear and conspicuous notices of right to cancel, that  
14 they failed to deliver two copies of the notice of right to  
15 cancel, and that the notice of right to cancel did not clearly  
16 and conspicuously disclose the time to cancel it and the  
17 opportunity to cancel it, especially given that the expiration  
18 date on the notice of right to cancel was the 29th of December,  
19 and the loan closed on January 3rd, about five days later.

20 THE COURT: Okay. Just bear with me a second, okay?

21 (Pause)

22 THE COURT: Is there anything else you want to say  
23 about either the TILA or RESPA claims?

24 MS. GRAY: The time limit for rescission may be found  
25 in 1635(f), which says, "In all regards, right of rescission

RESIDENTIAL CAPITAL, LLC, et al.

42

1 shall expire three years after the date of consummation." So  
2 that -- I had -- I hadn't mentioned that quoted citation. It's  
3 15 U.S.C. 1635(f).

4 1635(b) states the roadmap for rescission, and 1635(f)  
5 states the time for the exercise of the right to rescind.

6 THE COURT: So who owns the loan now?

7 MS. GRAY: The testimony in the trial is that  
8 Homecomings owned it and that --

9 THE COURT: Well, it doesn't anymore, but --

10 MS. GRAY: -- they owned it all along. I have no  
11 idea. They may not; I have no idea.

12 THE COURT: How get you rescission if they don't own  
13 the loan?

14 MS. GRAY: The borrower has already rescinded, and  
15 every act after that is subject to damages, every act that  
16 relates to her effort to enforce her right to rescind. I have  
17 no reason to doubt that Homecomings or its successor-in-  
18 interest, which is the ResCap Liquidation Trust, owns this.  
19 And up until the time, Ms. McNerney had accumulated substantial  
20 damages, and that's what her claim is about. The rescission is  
21 over. That's what the Jesinoski case says. It's over.  
22 Everything after that is her damages.

23 THE COURT: Is it correct that the negligence in fraud  
24 claims against Homecomings both seek to impose by curious  
25 liability on agency theory? The fraud that you've alleged is a

RESIDENTIAL CAPITAL, LLC, et al.

43

1 fraud by OMC --

2 MS. GRAY: And in act --

3 THE COURT: -- for which you say Homecomings was  
4 liable because OMC was its agent.

5 MS. GRAY: The trial transcript discloses actual fraud  
6 by Homecomings.

7 THE COURT: What fraud?

8 MS. GRAY: Actual fraud in failing to change, failing  
9 to accurately input the desktop information -- the desktop  
10 underwriter information. Every -- and this is what -- I think  
11 her name was Theresa Harrington (ph.) from Homecomings  
12 testified to that: I looked at the divorce decree, and I knew  
13 how long she was going to get child support. I looked at the  
14 verbal information of employment. I looked at her tax returns,  
15 and I looked at her paystubs, and I looked at the fact that the  
16 supposedly liquid asset is, in fact, an IRA. And I knew those  
17 things were entered wrong. And I didn't change it.

18 THE COURT: Okay.

19 MS. GRAY: And she wouldn't have qualified for the  
20 loan if I had done it right.

21 THE COURT: All right. Tell me again, whose testimony  
22 was that?

23 MS. GRAY: I think it was Theresa Harrington who -- or  
24 whoever came in for Homecomings, the person --

25 THE COURT: Okay.

RESIDENTIAL CAPITAL, LLC, et al.

44

1 MS. GRAY: -- who testified for Homecomings --

2 THE COURT: So that --

3 MS. GRAY: -- in the trial.

4 THE COURT: So you believe that those -- what you've  
5 just described reflects both -- assuming a duty -- would  
6 reflect both negligence and fraud on the part of Homecomings,  
7 not vicariously, because of OMC's conduct, but directly because  
8 of Homecomings' own conduct?

9 MS. GRAY: That's -- yes, Your Honor.

10 THE COURT: Okay. So that's what, both as to the  
11 negligence and fraud claims?

12 MS. GRAY: Yes, Your Honor.

13 THE COURT: Okay. What about your fraud on the court  
14 argument? I don't understand -- I frankly don't understand  
15 your argument, how you've alleged fraud on the court with  
16 respect to Homecomings, or how that's cognizable here. I mean,  
17 I think the Trust comes forward with case law from Ohio that  
18 it's not a separate cause of action.

19 MS. GRAY: That's true. It's not clear in Ohio. It's  
20 not clear that it's not.

21 THE COURT: Do you have any cases in Ohio that say  
22 it's a separate cause of action?

23 MS. GRAY: I think the law is evolving, Your Honor,  
24 and that is not -- it's a question that probably should be  
25 submitted to the Ohio Supreme Court at this time.

RESIDENTIAL CAPITAL, LLC, et al.

45

1 THE COURT: Well, I don't submit it. I decide.

2 MS. GRAY: Okay.

3 THE COURT: You can appeal to second -- you can appeal  
4 to the district court if you don't like my decision.

5 Let me ask again, the Trust has come forward with case  
6 law saying that fraud on the court does not create a separate  
7 cause of action in Ohio. Do you have any case law to the  
8 contrary?

9 MS. GRAY: No, I do not.

10 THE COURT: Okay. Let's deal with the Ohio Consumer  
11 Sales Practices Act claim. The Trust argues that the claim  
12 fails as a matter of law because the granting of a mortgage is  
13 considered a pure real estate transaction not subject to the  
14 Ohio Consumer Sales Practices Act claim.

15 MS. GRAY: That is not Ohio law, Your Honor.

16 THE COURT: Do you -- what case? Could you point me  
17 to a case?

18 MS. GRAY: Not off the top of my head --

19 THE COURT: The Trust --

20 MS. GRAY: -- Your Honor.

21 THE COURT: Well, you know, top of your head -- you  
22 filed --

23 MS. GRAY: Yes, I did.

24 THE COURT: -- an opposition to the -- a response to  
25 the objection. The Trust cites, in support of its position,

RESIDENTIAL CAPITAL, LLC, et al.

46

1 Brown v. Liberty Clubs, Inc., 543 N.E.2d 783 at page 785, Ohio  
2 (1989): "All parties correctly agree that the Consumer Act has  
3 no application in a pure real estate transaction." Pure real  
4 estate transaction is a term of art in Ohio.

5 The Trust also cites Hanlin, H-A-N-L-I-N v. Ohio  
6 Builders and Remodelers, Inc., 212 F.Supp.2d 752 at 757 (S.D.  
7 Ohio 2002), granting summary judgment to a lender under  
8 borrower's CSPA claims because the loan was a pure real estate  
9 transaction.

10 So let me ask you again --

11 MS. GRAY: May I file a supplemental brief on this,  
12 Your Honor?

13 THE COURT: No. No. I got -- you see this mountain  
14 of paper I have?

15 MS. GRAY: Yes, I do. Yes. And I got a mountain of  
16 paper just like that and I'm --

17 THE COURT: No, you didn't.

18 MS. GRAY: -- doing my best.

19 THE COURT: This is all my hearings in ResCap today.

20 MS. GRAY: I got --

21 THE COURT: You had your chance. Can you point me to  
22 a case in Ohio that would say that a mortgage transaction such  
23 as the one here does not fit this term of art "pure real estate  
24 transaction" that's not covered by the Ohio Consumer Sales  
25 Practices Act?

RESIDENTIAL CAPITAL, LLC, et al.

47

1 MS. GRAY: So, a case then comes to mind, Bridge v.  
2 Ocwen, I could get it for you, Your Honor, in a short time. I  
3 don't -- and I don't even know if that's the one I need. It's  
4 something involving Ocwen. But it has to do with the fact that  
5 where there is a broker involved and where there -- and where  
6 it's a loan origination and they're violate -- and their  
7 misrepresentations in the course of the transaction, it comes  
8 under the CSPA. It does -- it is not -- it is definitely not a  
9 pure real estate transaction.

10 THE COURT: What do you think the name of the case is?

11 MS. GRAY: The name Bridge comes to mind, but  
12 honestly, Your Honor, I can't give it to you without looking it  
13 up.

14 THE COURT: I'll give you until tomorrow at noon to  
15 submit a letter with --

16 MS. GRAY: Okay.

17 THE COURT: -- the name of the case and citation.

18 MS. GRAY: Okay, thank you.

19 THE COURT: What's deal with your Ohio Mortgage Broker  
20 Act claim? The Trust contends that the Ohio Mortgage Broker  
21 Act only applies to mortgage brokers and that mortgage lenders  
22 are not subject to the claim. And Ohio Revised Code annotates  
23 Section 1322.01(G) defines a mortgage broker. Keating v.  
24 America's Wholesale Lender, 2011 WL 2471732 at \*2, Northern  
25 District of Ohio, June 21, 2011 says: "Under the OMBA, the

RESIDENTIAL CAPITAL, LLC, et al.

48

1 lender is not a mortgage broker for purposes of the act."

2 Do you have any case law that would support  
3 Homecomings falling -- as the lender, falling under the Ohio  
4 Mortgage Broker Act?

5 MS. GRAY: Your Honor, I think it is question of fact  
6 whether Homecomings was, in fact, the lender. This loan  
7 was -- and that's in the testimony at the trial, too. This  
8 loan was set up to be sold to Fannie Mae and it was sold.

9 THE COURT: They were the lender. They may have sold  
10 it.

11 MS. GRAY: No, they sold it to Fannie Mae.

12 THE COURT: I'm finding right now they were --  
13 that argument was frivolous. Homecomings was the lender. They  
14 subsequently secured ties to the loan. OMC was the mortgage  
15 broker. Do you have any case law that supports -- you didn't  
16 cite any. Do you have a case that supports your position that  
17 Homecomings, as a lender, is subject to the Ohio Mortgage  
18 Broker Act.

19 MS. GRAY: I'm going to waive that argument, Your  
20 Honor.

21 THE COURT: You agree that your loss mitigation  
22 argument is moot?

23 MS. GRAY: Loss mitigation? There's no possibility  
24 for it, right? They -- right?

25 THE COURT: Address your unconscionability claim. So

RESIDENTIAL CAPITAL, LLC, et al.

49

1 what I understand from Ohio case law, specifically Cheap Escape  
2 Co. v. Crystal Windows & Doors Corp., 2010 WL 4018693 at \*2,  
3 Ohio Court of Appeals, October 14th, 2010: "Unconscionability  
4 includes an absence of meaningful choice on the part of one to  
5 a contract combined with contract terms that are unreasonably  
6 favorable to the other party." It doesn't seem to me that  
7 you've alleged any facts in the claim or in response to the  
8 objection that would satisfy the requirements under Ohio law  
9 for unconscionability of a claim -- an unconscionability claim.

10 MS. GRAY: The objection to claims stated that the  
11 claims failed as a matter of law.

12 THE COURT: Substantive unconscionability depends on  
13 whether the terms of the contract were unfair or unreasonable.  
14 Homecomings made the loan to McNerney. The monthly payments --  
15 they lowered her monthly payments, including escrow and  
16 insurance, and paid off her unsecured debts. And she wound up  
17 with a lower monthly payment than she had before. How can that  
18 be unconscionable?

19 MS. GRAY: It was unconscionable because it was still  
20 a payment that she could not afford, that everybody knew she  
21 could not afford it, and she was not hit with information about  
22 private mortgage insurance or that she would have to cash in  
23 her IRA until the closing date. At that point, she was on a  
24 train. She was on a coaster. She didn't know that she had --  
25 she didn't know that she had a right to rescind. She didn't

RESIDENTIAL CAPITAL, LLC, et al.

50

1 know that she had the right to cancel.

2 They buried that document -- a single document on page  
3 59 of a huge stack of documents.

4 THE COURT: Buried what document?

5 MS. GRAY: Her notice of right to cancel.

6 THE COURT: Oh. So you acknowledge she got a notice  
7 of right to --

8 MS. GRAY: She got one.

9 THE COURT: -- cancel?

10 MS. GRAY: She got one notice of right to cancel and  
11 it did not -- and it -- and the cancellation date was five days  
12 before the date of the closing. She did -- they did not  
13 comply. Truth in Lending requires two notices of right to  
14 cancel and it requires that the notice clearly and  
15 conspicuously state the deadline to cancel.

16 THE COURT: Okay. Let's address your breach of  
17 privacy claim. What's the basis for that claim? You've had  
18 no -- you've submitted nothing to show that Homecomings  
19 disclosed any information about Ms. McNerney.

20 MS. GRAY: They sent people out to the house to take  
21 pictures of the house. And the people who came and took  
22 pictures called up to them and told them to pay their bills,  
23 and told them to smile for the cameras, and drew attention to  
24 the fact that the house is in foreclosure to the neighbors to  
25 the right and the left. I believe that states intentional

RESIDENTIAL CAPITAL, LLC, et al.

51

1 breach of privacy, Your Honor.

2 THE COURT: Anything else you want to address?

3 MS. GRAY: No, Your Honor. Thank you.

4 THE COURT: Okay. Mr. Wishnew?

5 MR. WISHNEW: Thank you, Your Honor. Just briefly, a  
6 few facts --

7 THE COURT: Why hasn't Ms. Gray refuted your argument  
8 that applicable statutes of limitations bar the TILA and RESPA  
9 claims?

10 MR. WISHNEW: Sure, Your Honor. And that's exactly  
11 where I was going. There's one significant factual  
12 misstatement by Ms. Gray in her presentation, and I refer the  
13 Court to Exhibit E to the Wallace declaration. This is at  
14 docket number 9280-4. It's been marked page 30 of 222.

15 THE COURT: I'll have to look at it after -- I'm  
16 not -- what is it?

17 MR. WISHNEW: So it is -- this is at the Ohio State  
18 Court docket, Your Honor. And Ms. Gray, in her presentation,  
19 suggested that the answer was filed within thirty days of the  
20 complaint being filed. That's not correct.

21 THE COURT: When was it filed?

22 MR. WISHNEW: It was filed -- answer and counterclaim  
23 was filed June 16th, 2004, well over a year --

24 THE COURT: Hold on, do you --

25 MR. WISHNEW: -- well over a year past the

RESIDENTIAL CAPITAL, LLC, et al.

52

1 origination.

2 THE COURT: Let me ask you this, do you agree that the  
3 counterclaim asserted the right to rescind?

4 MR. WISHNEW: Yes, Your Honor.

5 THE COURT: And what was the closing date of the loan?

6 MR. WISHNEW: I believe --

7 THE COURT: Ms. Gray said June 3rd, 2003.

8 MS. GRAY: January 5th.

9 MR. WISHNEW: It's January 5th.

10 THE COURT: I'm sorry, I'm reading my own notes wrong.  
11 I wrote down January. January 3, 2003, do you agree with that?

12 MR. WISHNEW: That's -- I believe that's correct, Your  
13 Honor.

14 THE COURT: All right. And you agree that the statute  
15 of limitations for rescission was three years?

16 MR. WISHNEW: If she did not get notice, and our  
17 assertion is that she got notice based upon the statements we  
18 make at paragraph 18 of our objection.

19 THE COURT: So your position is that -- and what's the  
20 notice you believe Ms. McNerney received?

21 MR. WISHNEW: Truth in Lending statement, a notice of  
22 right to cancel, her HUD-1 settlement statement, the first  
23 payment notice and a disclosure regarding PMI insurance.

24 THE COURT: And what did they say about the right to  
25 rescind?

RESIDENTIAL CAPITAL, LLC, et al.

53

1 MR. WISHNEW: Give me one moment, Your Honor. Let me  
2 just look at the exhibit. These are Exhibits I, J, K, L and M  
3 to the Lathrop declaration at nine -- docket 9280-2. One  
4 moment, Your Honor.

5 Your Honor, I refer to Exhibit J of the Lathrop  
6 declaration. It looks like it's page 101 of 113. It states:  
7 "You are entering into a transaction that will result in a  
8 mortgage on your home. You have a legal right under the  
9 federal law to cancel this transaction, without cost, within  
10 THREE BUSINESS DAYS from whichever of the following events  
11 occurs last: (1) the date of the transaction" -- which is  
12 December 27, 2002 -- "or the date you received your Truth in  
13 Lending Disclosure, or the date you receive this notice of  
14 your right to cancel."

15 THE COURT: And when did she receive the notice of  
16 right to cancel?

17 MR. WISHNEW: Your Honor, it's dated December 27th,  
18 2002.

19 THE COURT: All right. So your position is she  
20 doesn't -- she didn't -- because she received that notice, she  
21 didn't have three years to rescind?

22 MR. WISHNEW: Correct, Your Honor. And also then,  
23 Your Honor, to the extent that you were to find to the  
24 contrary, the rescission does not occur until there's judicial  
25 determination.

RESIDENTIAL CAPITAL, LLC, et al.

54

1 THE COURT: Well, actually the Supreme Court decided  
2 otherwise. I've read Countrywide, because I've had this issue  
3 before in ResCap before the Supreme Court decided.

4 MR. WISHNEW: Okay.

5 THE COURT: You don't need a judicial determination.  
6 That was the split in authority. Do you disagree with what I  
7 just said?

8 MR. WISHNEW: I don't, Your Honor. One other  
9 point -- factual point for the record, Your Honor? Ms. Gray,  
10 in her presentation, suggested that Homecomings still owned the  
11 loan. In fact, the loan was extinguished as we set forth in --

12 THE COURT: Oh, yes. Now, I know the history. The  
13 house was condemned. They --

14 MR. WISHNEW: That's exactly right. In paragraph 31  
15 of our objection, we state Homecomings learned that Ms.  
16 McNerney had agreed to deed the property to a local land bank  
17 at the request of Lakewood Alive and the deed was --

18 THE COURT: No, I'm familiar with those facts.

19 MR. WISHNEW: Okay. So at that point, the lien was  
20 extinguished and so -- and we dismissed our claims. So at this  
21 point, the only thing --

22 THE COURT: You're not seeking to recover --

23 MR. WISHNEW: No, the --

24 THE COURT: -- the loan amount as a personal  
25 liability?

RESIDENTIAL CAPITAL, LLC, et al.

55

1 MR. WISHNEW: Exactly, Your Honor. So there's no  
2 defensive counterclaims here. At this point, it's only  
3 affirmative claims of Ms. McNerney and Ms. Gray.

4 THE COURT: The damages claim.

5 MR. WISHNEW: Exactly, Your Honor, yes.

6 THE COURT: That's true. All right, anything else you  
7 want to add?

8 MR. WISHNEW: No. I believe the -- I'll reply on our  
9 objections, Your Honor.

10 THE COURT: Right. I'm going to take the matter under  
11 submission. Thank you.

12 MR. WISHNEW: Thank you, Your Honor.

13 THE COURT: Thank you, Ms. Gray.

14 MS. GRAY: Thank you, Your Honor.

15 MR. WISHNEW: Your Honor, two more matters on today's  
16 calendar. Your Honor, the first -- the next matter is item 7  
17 on page 11 on today's agenda. This deals with a borrowers'  
18 trust ninetieth omnibus objection to claims, no liability  
19 claims, docketed at docket number 9296, filed on October 30th,  
20 2015.

21 Your Honor, through the ninetieth omnibus claims  
22 objection, the borrower trust seeks to expunge any proofs of  
23 claim that do not represent valid pre-petition claims against  
24 the debtors if they do not prove by a preponderance of the  
25 evidence any specific wrongdoing by the debtors. The borrower

RESIDENTIAL CAPITAL, LLC, et al.

56

1 trust thoroughly examined the various books and records in an  
2 effort to validate the accuracy of the allegations made in the  
3 responses in the claims at issue, and determined the books and  
4 records do not show any liability owing to the respondents.

5 The borrower trust determined that one claim should be  
6 allowed in the filed amounts, which is reflected on Exhibit B,  
7 and another amount should be asserted in an amount  
8 lesser -- oh, I'm sorry -- also determined that one claim is  
9 asserted in an amount greater than that for which the estate is  
10 liable, and the hearing on that claim has been adjourned to  
11 January 21st, 2016. That's the Mary Biancavilla claim.

12 THE COURT: Biancavilla's been adjourned?

13 MR. WISHNEW: Yes, Your Honor. There was -- it was  
14 reflected on the agenda --

15 THE COURT: That's fine. Okay.

16 MR. WISHNEW: -- and there's a notice of adjournment  
17 also filed.

18 THE COURT: Now, it's --

19 MR. WISHNEW: Apologies, Your Honor.

20 THE COURT: Okay, All right. So Biancavilla is  
21 adjourned.

22 MR. WISHNEW: Correct. There were two responses we  
23 received, Your Honor; one by Lori Tammaro at docket number  
24 9398, one by Thomas and Catherine Cooper at docket number 9379.  
25 I believe Mr. Cooper may have reached out to chambers

RESIDENTIAL CAPITAL, LLC, et al.

57

1 yesterday.

2 THE COURT: He did.

3 MR. WISHNEW: He spoke with me. So we have agreed to  
4 push that to January 21st --

5 THE COURT: Okay. So --

6 MR. WISHNEW: -- as well.

7 THE COURT: Okay.

8 MR. WISHNEW: I'm not --

9 THE COURT: The Coopers filed an opposition to the  
10 objection, and the Cooper opposition is at 9379.

11 MR. WISHNEW: That's correct, Your Honor.

12 THE COURT: And we understand -- because illness or --  
13 in his family?

14 MR. WISHNEW: His wife just fell ill and -- yes.

15 THE COURT: Right. So I appreciate your agreeing  
16 to --

17 MR. WISHNEW: No problem, Your Honor.

18 THE COURT: -- adjourn that.

19 MR. WISHNEW: So at this point, Your Honor,  
20 the -- there are certain uncontested claims and one contested  
21 claim by Lori Tammaro that are going forward. The Cooper claim  
22 and the Biancavilla claim are going forward on January 21st.

23 THE COURT: Um-hum.

24 MR. WISHNEW: And Ms. Biancavilla's response deadline  
25 is December 30th, which we agreed to. So --

RESIDENTIAL CAPITAL, LLC, et al.

58

1 THE COURT: And --

2 MR. WISHNEW: -- I'll pause for appearances. I'm not  
3 sure if Ms. Tammaro has appear --

4 THE COURT: Ms. Tammaro, are you on the phone?

5 No response. Okay, no response from Ms. Tammaro.

6 Just bear with me a second, okay?

7 MR. WISHNEW: Sure.

8 THE COURT: All right, since Ms. Tammaro is not -- did  
9 file a response to the objection but has not appeared, I'm not  
10 going to hear argument and I'll resolve it in a written order.

11 MR. WISHNEW: Okay, very good, Your Honor. So that  
12 then -- I guess with that, I'd ask for the Court to also  
13 approve the uncontested claims in omnibus ninety for the  
14 reasons set forth --

15 THE COURT: Okay.

16 MR. WISHNEW: -- that we addressed in Exhibit A.

17 (Pause)

18 THE COURT: All right, so with the exception of those  
19 portions of the objection which have been adjourned until  
20 January, the Trust's objections are sustained. I do want to  
21 note with respect to the claim filed by Charles T. Clark, which  
22 is listed in the claims register as a general unsecured claim  
23 against GMACM, the Trust has determined that the claim should  
24 be allowed as a general unsecured claim against GMACM in the  
25 filed amount of 19,712 dollars. As I understand it, the Trust

RESIDENTIAL CAPITAL, LLC, et al.

59

1 advised Mr. Clark that his claim would be allowed in full and  
2 provided him with a form of stipulation to acknowledge his  
3 agreement. Clark informed the Trust that he would not agree to  
4 sign the stipulation because he was not willing to accept the  
5 treatment of his claim as provided in Article IIID2(f) of the  
6 plan even though his claim would receive the same treatment as  
7 similarly situated creditors.

8 As a result, the Trust requests that the Court enter  
9 an order allowing the claim in the asserted amount so that it  
10 will receive the treatment of an allowed claim against GMACM  
11 debtors as provided in Article IIID2(f) of the plan.

12 The Trust's objection seeking to allow the Clark claim  
13 in full is sustained, and that claim will be allowed as in the  
14 manner provided in the objection.

15 MR. WISHNEW: Thank you very much, Your Honor.

16 THE COURT: Okay. Does that dispose of everything for  
17 today?

18 MR. WISHNEW: One more matter.

19 THE COURT: One more, okay. Oh, yes, I've got the  
20 other one. Go ahead. Sorry.

21 MR. WISHNEW: It's okay. Your Honor, the last matter  
22 is an uncontested objection that the borrower trust filed  
23 against claim 5857 of Mary McDonald individually and as  
24 personal representative of the estate of Anthony McDonald.

25 Your Honor, this --

RESIDENTIAL CAPITAL, LLC, et al.

60

1 THE COURT: Before you go on, I've just been handed a  
2 note that a Mr. John Hightower is on the phone on behalf of  
3 Mary McDonald. Is that correct?

4 MR. HIGHTOWER: Yes, Your Honor. John Hightower is  
5 here.

6 THE COURT: Are you an attorney?

7 MR. HIGHTOWER: Yes, sir.

8 THE COURT: You're Ms. McDonald's attorney?

9 MR. HIGHTOWER: That is correct. I represented Mrs.  
10 McDonald in the filing of the original complaint against GMAC  
11 and The Law Office of David Stern.

12 THE COURT: Okay.

13 MR. HIGHTOWER: And then when GMAC -- when ResCap  
14 filed bankruptcy, obviously, it was moved to here.

15 THE COURT: And as I -- but you did not file any  
16 response to the objection, correct?

17 MR. HIGHTOWER: I did not. I was not aware that I was  
18 required to. I -- I'm just --

19 THE COURT: Do you think you just show up at  
20 a -- there was an objection deadline shown on the objection.  
21 You didn't file a response. You think you just show up at a  
22 hearing by phone and -- well, let me hear -- what is it -- let  
23 me ask you, Mr. Hightower, what is that you're -- what are you  
24 planning to do today?

25 MR. HIGHTOWER: I wasn't sure. The notice of the

RESIDENTIAL CAPITAL, LLC, et al.

61

1 hearing was only sent to me on Monday. It didn't give an  
2 indication as to what action will be taken on the matter.  
3 I -- my -- based on experience, I'd assumed that it just might  
4 be some type of case management conference where we would take  
5 some direction as to planning out how the remainder of the  
6 contested matter would be addressed and taking discovery, et  
7 cetera.

8 THE COURT: It is not a contested matter if you don't  
9 file a response to the objection to claim.

10 MR. HIGHTOWER: I --

11 THE COURT: Your client was served with -- well, I'll  
12 check with Mr. Wishnew.

13 Was --

14 MR. WISHNEW: So Ms. --

15 THE COURT: -- Ms. McDonald served with the objection  
16 to claim?

17 MR. WISHNEW: Mr. Hightower was served by e-mail on  
18 November 10th -- I'm referring, Your Honor, to the affidavit of  
19 service docketed at 9315. Mr. Hightower was served by e-mail  
20 on November 10th and also, we served Mr. Hightower by overnight  
21 mail at the address specifically included on the proof of  
22 claim, 201 East Kennedy, Suite 1000, Tampa, Florida 33602.

23 THE COURT: And what is it you served him with,  
24 because I got voluminous papers here?

25 MR. WISHNEW: We would serve --

RESIDENTIAL CAPITAL, LLC, et al.

62

1 MR. HIGHTOWER: Your Honor, I'll just shortcut. I  
2 don't contest that I've been served. I don't want to waste the  
3 Court's time. But the -- I -- unfortunately, this was all -- I  
4 mean, very unfortunately, was overlooked as to the requirement  
5 of filing a response. And the only thing I can do is just  
6 submit to the Court's mercy to allow us an opportunity to file  
7 the response.

8 One of the reasons why I was lured -- not  
9 intentionally lured, but I wasn't aware that I needed to file a  
10 response because I was engaged in settlement discussions with  
11 counsel for GMAC well, well past the time that would've been  
12 required for filing the response, then -- which certainly  
13 indicated to me that there wasn't an uncontested objection,  
14 given that we were engaged in these settlement discussions --

15 THE COURT: Well, look --

16 MR. HIGHTOWER: -- well past that deadline.

17 THE COURT: I don't know what we -- stop. I don't  
18 know whether you were engaged in settlement discussions or not.  
19 I prepare for a hearing. I have read all these papers, okay?  
20 There was no response filed. There was a deadline shown for  
21 filing a response. You didn't contact the Court and ask to  
22 have it adjourned.

23 I go through all this work in preparing for a hearing  
24 today, reading every scrap of paper that was filed in  
25 connection with the objection to the McDonald claim, and you

RESIDENTIAL CAPITAL, LLC, et al.

63

1 think you can just get on the phone and say oh, I didn't know I  
2 was supposed to file anything?

3 MR. HIGHTOWER: I -- and I'm very sorry that it comes  
4 off as disrespectful, Your Honor. It is certainly --

5 THE COURT: Mr. Hightower?

6 MR. HIGHTOWER: -- not my intent.

7 THE COURT: Mr. Hightower, at the very top of the  
8 notice of the ResCap borrower claims trust objection to proof  
9 of claim number 5857 filed by Mary McDonald, et cetera, is the  
10 following: Hearing date: December 16, 2015 at 10 a.m.

11 Response deadline: December 3, 2015 at 4 p.m. That's on --

12 MR. HIGHTOWER: December 3, 2015 was the deadline for  
13 the response?

14 THE COURT: Yes. Yeah.

15 MR. HIGHTOWER: What is that document? I'm sorry,  
16 Your Honor, I --

17 THE COURT: Mr. Hightower?

18 MR. HIGHTOWER: -- do not recall seeing that.

19 THE COURT: It's the notice of ResCap borrower claims  
20 trust objection to proof of claim number 5857 filed by Mary  
21 McDonald, individually and as personal representative of the  
22 estate of Anthony McDonald. It's ECF docket number 9310-1  
23 filed on November 10th, 2015. Okay? And attached to it is  
24 about an inch-and-a -- about two inches of paper, every piece  
25 of which I've read, that relates to this. And right at the

RESIDENTIAL CAPITAL, LLC, et al.

64

1 very top of the first page, it has hearing date, December 16th,  
2 2015 at 10 a.m. and response deadline, December 3, 2015 at 4  
3 PM. And --

4 MR. HIGHTOWER: That document, Your Honor, I do not  
5 believe I was served, and maybe that's what counsel is  
6 addressing, so I apologize if I jumped the gun on that one.  
7 But that document, I do not believe I was served, and I  
8 certainly wasn't served it through an ECF --

9 THE COURT: That's the objection. That's what we're  
10 here on, the text of it, I said, it -- the top of the first  
11 page, it says it. On page 2 of the notice, it also  
12 says -- I'll leave words out -- responses, if any, to the  
13 objection must be made in writing -- I'll leave a lot of words  
14 out -- filed and served so as to be received no later than  
15 December 3, 2015 at 4 p.m.

16 MR. HIGHTOWER: I did not receive that document, Your  
17 Honor. I'm --

18 THE COURT: Mr. Wishnew, can you respond to that?

19 MR. WISHNEW: Your Honor, we -- the docket and the  
20 affidavit of service indicating that Mr. Hightower was served  
21 by both e-mail to [hightower@mcintyrefirm.com](mailto:hightower@mcintyrefirm.com),  
22 M-C-I-N-T-Y-R-E-F-I-R-M dot com. He was served on November  
23 10th by e-mail with this document, as well as served by  
24 overnight mail at the address included on the subject proof of  
25 claim. And both forms of service were effectuated.

RESIDENTIAL CAPITAL, LLC, et al.

65

1 THE COURT: Are you registered on ECF, Mr. Hightower?

2 MR. HIGHTOWER: Not for this case, Your Honor. If I  
3 may ask counsel, what was the -- who was the sender of the  
4 e-mail service?

5 MR. WISHNEW: It would've been Legal Vision Consulting  
6 Group, who acts as the servicing agent for the ResCap Borrower  
7 Claims Trust.

8 MR. HIGHTOWER: Is there an address that I can use to  
9 search to identify whether I received it?

10 MR. WISHNEW: I don't know the specific sender e-mail  
11 address, but I can say it was sent November 10th or  
12 11th -- November 10th.

13 MR. HIGHTOWER: Yeah, I'm looking through my November  
14 10th -- it's in my junk e-mail box.

15 THE COURT: That's nice.

16 MR. HIGHTOWER: So it is there. I don't know if it  
17 was a mass sending and maybe that's the reason it was collected  
18 in my junk e-mail, or --

19 MR. WISHNEW: It was not a mass sending.

20 MR. HIGHTOWER: -- what the case may be.

21 MR. WISHNEW: Very limited number of servers --

22 MR. HIGHTOWER: I'm moving it over now.

23 THE COURT: And they also say they served you by mail.

24 MR. WISHNEW: Overnight mail, Your Honor.

25 THE COURT: Overnight mail.

RESIDENTIAL CAPITAL, LLC, et al.

66

1 MR. HIGHTOWER: I have -- I don't have a response to  
2 that one, Your Honor. I haven't seen it. I don't know if it  
3 just -- well, what was the address it was sent to, I'm sorry?

4 MR. WISHNEW: It was the same address on the file  
5 proof of claim, which is McIntyre, Panzarella, Thanasides,  
6 Bringgold & Todd, P.L., 201 East Kennedy, Suite 1000, Tampa,  
7 Florida 33602.

8 MR. HIGHTOWER: Oh, that's an old address. And  
9 I -- admittedly, you know, I should've updated the mailing  
10 address, removed -- of course, the claim was filed, I don't  
11 know, maybe three years ago. Quite frankly, this kind of fell  
12 off my attention as far as updating the address. We moved a  
13 couple years ago.

14 MR. WISHNEW: Your Honor, I'd like to also address one  
15 point. If I could direct a question to Mr. Hightower?

16 THE COURT: All right.

17 MR. WISHNEW: He indicates that he had  
18 conversations -- held discussions with counsel for GMAC  
19 Mortgage. It would've been someone at my firm, presumably, and  
20 I've not spoken with Mr. Hightower. I'm not sure if he spoke  
21 with maybe possibly our co-counsel at Bradley Arant.

22 THE COURT: Who have you spoken to, Mr. Hightower?

23 MR. HIGHTOWER: This was the attorney who originally  
24 represented GMAC in the litigation hearing in the Middle  
25 District of Florida. I cannot recall his name. He did

RESIDENTIAL CAPITAL, LLC, et al.

67

1 not -- part of the firm -- he was not a part of the  
2 representation of ResCap at all. The representation he made to  
3 me was that he was in discussions with counsel for ResCap and  
4 there's -- carrying messages back and forth between them to me.

5 MR. WISHNEW: I'm sorry, who was this individual?

6 MR. HIGHTOWER: I can't --

7 THE COURT: Do you have a name?

8 MR. HIGHTOWER: I'm trying to remember. Let me see if  
9 I can search my e-mails real quick. It was a firm out of  
10 Alabama, I believe.

11 THE COURT: Bradley Arant. On the pleading -- on the  
12 front of the pleading from Bradley Arant, it shows Ethan T.  
13 Tidmore.

14 MR. HIGHTOWER: Tidmore, yes. I believe that's who it  
15 was.

16 THE COURT: All right.

17 MR. HIGHTOWER: It was either Mr. Tidmore or someone  
18 else in his firm. I believe there were a couple of attorneys  
19 who were on that case at the time.

20 THE COURT: Very reluctantly, Mr. -- because look, Mr.  
21 Hightower, I believe in resolving matters on the merits, not by  
22 default. I'm going to adjourn this claim objection. What's  
23 the next hearing date, Mr. --

24 MR. WISHNEW: January 21st, Your Honor.

25 THE COURT: January -- to January 21st. Bear with me

RESIDENTIAL CAPITAL, LLC, et al.

68

1 a second. I'm going to require any written response to the  
2 objection by Thursday, January 7th, 2016 at 5 p.m., and may  
3 reply from the Trust to Friday -- to Thursday, January 14th at  
4 5 p.m.

5 MR. WISHNEW: Okay.

6 MR. HIGHTOWER: I appreciate that very much, Your  
7 Honor, and I hate that I've made a really bad first impression.  
8 I just submit my sincere apologies and hope the Court will give  
9 me an opportunity to make it up.

10 THE COURT: May I ask, where are you located?

11 MR. HIGHTOWER: Tampa, Florida.

12 THE COURT: Mr. Wishnew, do you have any objection to  
13 counsel appearing by telephone at the next hearing?

14 MR. WISHNEW: No, Your Honor.

15 THE COURT: All right. I'll permit you to appear by  
16 telephone. You need to arrange through CourtCall to do that.

17 It's --

18 MR. HIGHTOWER: Understood.

19 THE COURT: It's usually not my preference to hear  
20 argument by telephone, but I do -- I mean, we extensively use  
21 CourtCall for this. But you're in Florida. I'm not going to  
22 make you come up here for it. May I ask you this?

23 MR. HIGHTOWER: I appreciate that.

24 THE COURT: Have you been able to recover any money  
25 from The Law Offices of Stern?

RESIDENTIAL CAPITAL, LLC, et al.

69

1 MR. HIGHTOWER: No, Your Honor. We -- about two weeks  
2 before trial, they stipulated to a judgment of 1.5 million  
3 dollars, which was basically a reflection that they believe  
4 that they're uncollectable.

5 THE COURT: Okay. Anything else for today, Mr.  
6 Wishnew?

7 MR. WISHNEW: That's it, Your Honor.

8 THE COURT: All right. We're adjourned.

9 MR. WISHNEW: Thank you for your time.

10 MR. HIGHTOWER: Thank you, Your Honor.

11 (Whereupon these proceedings were concluded at 11:39 AM)

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2 I N D E X

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4 RULINGS

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	PAGE	LINE
6 Motion for relief from stay denied	14	14
7 The Trust's objection seeking to	59	14
8 allow the Clark claim in full is sustained		

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2 C E R T I F I C A T I O N

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4 I, Aliza Chodoff, certify that the foregoing transcript is a  
5 true and accurate record of the proceedings.

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11 ALIZA CHODOFF

12 AAERT Certified Electronic Transcriber CET\*\*D-634

13

14 eScribers

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16 New York, NY 10040

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18 Date: December 17, 2015

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